BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Qualified Extraordinary Costs	)))))	Case No. EO-2022-0040
In the Matter of the Petition of The Empire District Electric Company d/b/a Liberty to Obtain a Financing Order that Authorizes the Issuance of Securitized Utility Tariff Bonds for Energy Transition Costs Related to the Asbury Plant	)))))	Case No. EO-2022-0193

<u>POST-HEARING REPLY BRIEF</u>
<u>OF THE EMPIRE DISTRICT ELECTRIC COMPANY D/B/A LIBERTY</u>

Table of Contents

I. INTRODUCTION 1

II. THE COMMISSION MUST APPLY THE SECURITIZATION STATUTE AS WRITTEN 2

a. Determination 1: Under the Securitization Statute, the Commission Must Determine the Qualified Extraordinary Costs and the Energy Transition Costs by Determining the Amounts Prudently Incurred by Liberty Relating to Storm Uri and Asbury 6

i. There is No Evidence in the Record to Overcome the Prudency Presumption as to Storm Uri Qualified Extraordinary Costs 11

ii. There is No Evidence in the Record to Overcome the Prudency Presumption on Asbury Energy Transition Costs 13

b. The Commission Should Authorize a Carrying Charge Based on Liberty's WACC 16

c. Determination 2: The Commission Must Determine Whether Securitization is Expected to Create Quantifiable Benefits to Customers 18

d. Determination 3: The Commission Must Determine Whether the Method of Cost Recovery is Just and Reasonable and in the Public Interest 18

III. THE COMMISSION SHOULD REJECT STAFF'S ARGUMENT THAT THE ADIT BALANCES SHOULD BE REFUNDED 21

IV. CONCLUSION 21

I. INTRODUCTION

The ultimate question to be decided in this case is whether Liberty has met the conditions set forth in the Securitization Statute relating to Storm Uri and Asbury costs. Nothing more, nothing less. While the mechanics of securitization are complex, the statute is clear and straightforward – both in terms of substance and process. The Securitization Statute requires the Commission to make three determinations: (1) what costs were prudently incurred, (2) whether securitization is expected to create quantifiable benefits to customers, and (3) the method for recovering from customers the cost of repaying the securitized bonds that is just and reasonable and in the public interest. Staff and OPC posit various permutations of a theory that purports to give the Commission carte blanche discretion to ignore and disregard statutory language in the guise of overseeing just and reasonable ratemaking that is in the public interest. The Commission does not have unfettered discretion to ignore the clear wording of the Securitization Statute in favor of self-legislated changes to that statute that Staff and OPC suggest.[1]

While Staff's and OPC's initial post-hearing briefs are replete with examples of proposed deviations from the statutory mandate, one example succinctly reflects this point: Staff makes the remarkable claim that the Securitization Statute does not provide for recovery of extraordinary costs that were prudently incurred "simply because they meet the definition of 'qualified extraordinary costs.'"[2] Staff justifies this deviation on the basis that "…all of the burdens of securitization (irrevocable, binding and nonbypassable payment obligations) fall on ratepayers, all of the benefits of securitization should also go to ratepayers in order for securitization to meet the

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[1] Please see the Initial Post-Hearing Brief of The Empire District Electric Company d/b/a Liberty ("Liberty" or the "Company") for a complete discussion of all factual and legal disputes before the Missouri Public Service Commission ("Commission") in these consolidated dockets under RSMo. §393.1700 (the "Securitization Statute"). This Reply Brief summarizes the primary arguments and responds to the Initial Post-Hearing Briefs of the Staff of the Commission ("Staff") and the Office of the Public Counsel ("OPC").

[2] Staff Initial Brief, p. 22.

requirement that securitization be just and reasonable and in the public interest."[3] The Commission should reject all of the Staff's and OPC's requests for deviations from the statute because to do so would exceed the Commission's authority granted by the Legislature under the Securitization Statute.

II. THE COMMISSION MUST APPLY THE SECURITIZATION STATUTE AS WRITTEN

The Missouri Legislature was intentional when it enacted the Securitization Statute. It created a process that is highly prescriptive compared to other statutes that guide the Commission's work. The statute prescribes what must be included in the Company's petition, it prescribes the types of costs that can be recovered, it prescribes what must be in the Commission's order, and it prescribes what must happen after an order is issued. One is hard pressed to think of another utility statute that is so specific and directive.

Here, the Commission must take the dictates of the statute and apply them to the facts of the case. In doing so, the Commission may only apply the law as written and cannot expand its powers through use of discretion. It is well established that:

> The PSC "is a creature of statute and can function only in accordance with" its enabling statutes. *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n,* 716 S.W.2d 791, 796 (Mo. banc 1986). Its "powers are limited to those conferred by ... statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Util. Consumers' Council of Missouri, Inc.,* 585 S.W.2d at 49; *see also* § 386.040[4] (creating the PSC and vesting it with "the powers and duties ... specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes" of its governing statutes). ***If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power***.

State ex rel. MoGas Pipeline, LLC v. Public Service Commission, 366 S.W.3d 493, 496 (Mo. banc 2012) (internal notes omitted) (emphasis added).

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[3] Staff Initial Brief, p. 7.

Nevertheless, Staff and OPC make repeated recommendations that would require the Commission to knowingly and intentionally set certain parts of the Securitization Statute aside or completely disregard the statutory language. In essence, Staff and OPC claim that the Commission's responsibility to oversee just and reasonable ratemaking in the public interest creates a limitless discretion that includes the option to apply certain laws that govern the regulation of utilities in Missouri but ignore others, even in cases where there is specific statutory direction and clear legislative intent.

Repeatedly, Staff and OPC recommend disallowing recovery of certain costs because, in their view, recovery of those costs would not be permissible at other times and under other, hypothetical circumstances. Those proposed disallowances are based primarily on Staff's and OPC's subjective opinions of how those issues could, hypothetically, be decided in other unrelated circumstances. Staff and OCP apply a different regulatory framework to this proceeding than that set forth in the Securitization Statute.

A prime example of this is the attempt to graft onto the Securitization Statute the 95/5 sharing mechanism that itself is a creature of a different Missouri law, RSMo. §386.266.1. On this issue, Staff and OPC claim that because Missouri law typically allows utilities to true-up 95% of the deviation between their purchased commodity costs and their normalized forecasts of the same through the Fuel Adjustment Clauses, that Liberty should be allowed to recover only 95% of its Qualified Extraordinary Costs here, whether those costs were incurred prudently or not.[4]

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[4] The mechanics of the FAC are defined at RSMo. §386.266.1, which directs how fuel adjustment proceedings must be conducted and states that "[t]he commission may, in accordance with existing law, include in such rate schedules features designed to prove the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities." The limitation that Liberty can reconcile only 95% of its deviation from normal levels of fuel and purchased power expense is designed to create such an incentive.

The only reference to the fuel adjustment process in the Securitization Statute is in RSMo. §393.1700.(3), which expressly acknowledges that a decision not to securitize cannot be held against a utility that chooses to recover fuel costs through other means, such as through a fuel adjustment proceeding (emphasis added):

> No electrical corporation is required to file a petition for a financing order under this section or otherwise utilize this section. An electrical corporation's decision not to file a petition for a financing order under this section shall not be admissible in any commission proceeding nor shall it be otherwise utilized or relied on by the commission in any proceeding respecting the electrical corporation's rates or its accounting, including, without limitation, any general rate proceeding, **fuel adjustment clause docket**, or proceedings relating to accounting authority, whether initiated by the electrical corporation or otherwise.

The Securitization Statute does not contain any language, express or implied, giving the Commission the authority to apply that 95/5 sharing mechanism to securitization.

Even worse, Staff and OPC attempt to apply fuel adjustment laws and mechanisms to the Securitization Statute without even providing a theory as to how the Commission can presume that it was the Legislature's intent to do so when it omitted discussion of certain portions, but not others, of the FAC-related provisions from the Securitization Statute. To do so would be clear error of law and would do nothing more than penalize Liberty.[5] No such penalty is envisioned in the Securitization Statute. The Securitization Statute does not make any reference to RSMo. §386.266.1 nor is there any discussion of disallowing Qualified Extraordinary Costs to create an "efficiency" incentive.

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[5] In addition to being unlawful, denial of 5% of Liberty's Qualified Extraordinary Costs makes no sense given the intent of the statute and rules that govern the FAC, which are designed to allow a utility to recover all of its fuel and purchased power. To do so, a normalized baseline of costs is established for the utility in each rate case. The efficiency incentive cited by the Staff and OPC is created by allowing the utility to *reconcile* 95% of its actual costs in any period to the baseline. Because the baseline is normalized, a utility may receive slightly more than its actual expenses in some years and, in other years, slightly less; over time, costs should roughly equal its expenses. In this case, the balance outstanding is based on the reconciliation of the normalized baseline to a period of extraordinary costs. A decision to deny recovery of 5% of the difference would therefore constitute a permanent disallowance imposed for reasons having nothing to do with the incentive structure of the FAC.

Elsewhere, Staff attempts to derive a view of the Commission's expansive discretion from a reading of two subsections of the Securitization Statute, RSMo. §393.1700.2(3)(c)a and 393.1700.2(3)(c)b, the significance of which is evidenced by the more than thirty separate citations made to one or both subsections in Staff's Initial Brief. Those subsections define some elements that must be included in a Financing Order authorizing Liberty to proceed with a securitization. Among other things, the following must be included:

> The amount of securitized utility tariff costs to be financed using securitized utility tariff bonds and a finding that recovery of such costs is just and reasonable and in the public interest… [and a] finding that the proposed issuance of securitized utility tariff bonds and the imposition and collection of a securitized utility tariff charge are just and reasonable and in the public interest…"

Herein lies the error in legal reasoning that pervades both Staff's and OPC's arguments – they have chosen to interpret the requirement that the Commission find that the utility tariff charge is just and reasonable and in the public interest as the standard that the Commission should apply when determining how much Liberty should be allowed to recover through securitization. It is **not**. In fact, the Securitization Statute clearly establishes that the only basis to determine the quantum of what is recoverable is a determination of which costs were prudent.[6] As explained below, the "just and reasonable" and "public interest" findings are tied to a determination of use of the securitization method as a means to recover those costs.

For its part, OPC chooses not to cite any specific basis authorizing the Commission to supersede statutory directives. Instead, OPC relies simply on a view that the Legislature did not limit the "preexisting broad discretion the Commission has as to what recovery to allow an electric

[6] Although prudence is not the only component of the definitions of "energy transition costs" for Asbury and "qualified extraordinary costs" for Storm Uri, only prudence is in dispute in this case. RSMo. §393.1700.1(7) and (13). For example, there is no dispute that the Storm Uri costs are "of an extraordinary nature which would cause extreme customer rate impacts if reflected in retail customer rates recovered through customary ratemaking" and were incurred during an "anomalous weather event." RSMo. §393.1700.1(13).

utility" when it passed the Securitization Statute.[7] The notion that some overarching "preexisting broad discretion" somehow allows the Commission to override or ignore, in whole or in part, laws that the Legislature may choose to pass is contrary to Missouri law.

In a context where the Commission acted beyond its statutory authority, the Court in *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 481 (Mo. App. W.D. 2013) stated (emphasis added):

> Fuel adjustment clauses are thus purely statutory creatures. The PSC's "powers are limited to those conferred by . . . statute[ ], either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Util. Consumers Council*, 585 S.W.2d at 49. Applied here, the PSC's power to approve or interpret a fuel adjustment clause is necessarily constrained by the authority described in section 386.266.1 and by the regulations promulgated pursuant to the authority of section 386.266.9. If a fuel adjustment clause as approved or subsequently interpreted exceeds the authority extended by section 386.266 or by the promulgated regulations, then it is unlawful under the rationale set forth in *Utility Consumers Council.*

Any attempt to exceed the statutory authority provided by the Securitization Statute would be equally unlawful.

a. Determination 1: Under the Securitization Statute, the Commission Must Determine the Qualified Extraordinary Costs and the Energy Transition Costs by Determining the Amounts Prudently Incurred by Liberty Relating to Storm Uri and Asbury

First and foremost, the Commission must determine what costs were "prudently" incurred by Liberty in the case of Storm Uri and, in the case of Asbury, those costs that were "reasonable and prudent." Liberty's Qualified Extraordinary Costs are all the prudently incurred costs associated with Storm Uri, while Liberty's Energy Transition Costs are the reasonable and prudent costs related to Asbury. Once those amounts are determined, they define precisely the balance that Liberty is authorized to securitize, provided that sufficient benefits for doing so exist (the

[7] OPC Initial Brief, p. 6.

Commission's second determination discussed below). There is no mechanism by which the Commission can authorize the securitization of anything other than the sum of the Qualified Extraordinary Costs and the Energy Transition Costs.

On this point, the term "prudent" is only used **twice** in the statute and is limited to the definitions of "Qualified Extraordinary Costs" and "Energy Transition Costs":

> (13) "Qualified extraordinary costs", costs incurred **prudently** before, on, or after August 28, 2021, of an extraordinary nature which would cause extreme customer rate impacts if reflected in retail customer rates recovered through customary ratemaking, such as but not limited to those related to purchases of fuel or power, inclusive of carrying charges, during anomalous weather events;[8]
>
> (7) "Energy transition costs" include all of the following: (a) Pretax costs with respect to a retired or abandoned or to be retired or abandoned electric generating facility that is the subject of a petition for a financing order filed under this section where such early retirement or abandonment is deemed **reasonable and prudent**[9] by the commission through a final order issued by the commission, include, but are not limited to, the undepreciated investment in the retired or abandoned or to be retired or abandoned electric generating facility and any facilities ancillary thereto or used in conjunction therewith, costs of decommissioning and restoring the site of the electric generating facility, other applicable capital and operating costs, accrued carrying charges, and deferred expenses, with the foregoing to be reduced by applicable tax benefits of accumulated and excess deferred income taxes, insurance, scrap and salvage proceeds, and may include the cost of retiring any existing indebtedness, fees, costs, and expenses to modify existing debt agreements or for waivers or consents related to existing debt agreements; (b) Pretax costs that an electrical corporation has previously incurred related to the retirement or

[8] RSMo. §393.1700(1)(15) (emphasis added). The term "imprudent" is used in RSMo. §393.1700(3)(5): "After the issuance of a financing order with or without conditions, the electrical corporation retains sole discretion regarding whether to cause the securitized utility tariff bonds to be issued, including the right to defer or postpone such sale, assignment, transfer, or issuance. Nothing shall prevent the electrical corporation from abandoning the issuance of securitized utility tariff bonds under the financing order by filing with the commission a statement of abandonment and the reasons therefor; provided, that the electrical corporation's abandonment decision shall not be deemed ***imprudent*** because of the potential availability of securitized utility tariff bond financing; and provided further, that an electrical corporation's decision to abandon issuance of such bonds may be raised by any party, including the commission, as a reason the commission should not authorize, or should modify, the rate-making treatment proposed by the electrical corporation of the costs associated with the electric generating facility that was the subject of a petition under this section that would have been securitized as energy transition costs had such abandonment decision not been made, but only if the electrical corporation requests nonstandard plant retirement treatment of such costs for rate-making purposes." (emphasis added)

[9] Notably, the definition of "energy transition costs" plays off the Commission's definition of prudency, stating that the costs in question must be "reasonable and prudent."

> abandonment of such an electric generating facility occurring before August 28, 2021.[10]

This Commission defined many years ago how prudency is determined:

> [A utility's] conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company.

In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway Rate Base and Related Issues. In the Matter of Union Electric Company of St. Louis, Missouri, for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company, 27 Mo. P.S.C. (N.S.) 183, 192-193 (1985).

Liberty's expert witness John Reed explained the four fundamental components of the prudence standard in Missouri and demonstrated why utilities are entitled to full recovery of prudently incurred costs. As Mr. Reed explained, the prudence standard is rooted in case law, not only from this Commission but with the original standard of prudence in ratemaking being expressed by the United States Supreme Court in 1923 as a means of guiding regulators conducting reviews of utility capital investments. *Missouri ex. rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276 (1923).

The first element is that prudence relates to actions and decisions.[11] Costs themselves are neither prudent nor imprudent. It is the decision or action that led to cost incurrence that must be reviewed and assessed, not the results of those decisions. In other words, prudence is a measure of the quality of decision-making and does not reflect how the decisions turned out.

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[10] RSMo. §393.177.1(7) (emphasis added).
[11] Ex 1, Reed Surreb., pp. 6-12.

The second factor is a presumption of prudence, which is often referred to as a rebuttable presumption. The burden of showing that a decision is outside of the reasonable bounds falls, at least initially, on the party challenging the utility's actions. The third feature is that hindsight is excluded from a prudence review. A utility's decisions must be judged based upon what was known or reasonably knowable at the time the decision was made by the utility. For obvious reasons -- information that was not known or reasonably knowable at the time of the decision being made cannot be considered in evaluating the reasonableness of a decision, and subsequent information on "how things turned out" cannot influence the evaluation of the prudence of a decision.

The final feature is that decisions being reviewed need to be compared to a range of reasonable behavior; prudence does not require perfection, nor does prudence require achieving the lowest possible cost. This standard recognizes that reasonable people can differ and that there is a range of reasonable actions and decisions that is consistent with prudence. Simply put, a decision can only be labelled as imprudent if it can be shown that such a decision was outside the bounds of what a reasonable person would have done under those circumstances.

Incredibly, Staff argues in this case that "it is necessary that an expense be prudent before it can be recovered in rates, but prudence, by itself, is not sufficient for recovery of an expense."[12] On that issue, Staff cites the Missouri Supreme Court case – *Spire Mo., Inc. v. Pub Serv. Comm'n*, 618 S.W.3d 225, 233 (Mo.2021) – but that decision doesn't support Staff's statement. The *Spire* decision was limited solely to rate case expense and did not address the overall prudence standard as suggested by Staff and OPC. Staff and OPC entirely misread the *Spire* decision:

> Generally, ratepayers benefit from rate cases because they have an interest in ensuring the financial well-being of the utilities that serve them. Therefore, ratepayers justly and reasonably can be expected to pay a utility's expenses in

[12] Staff Initial Brief, p. 33.

> bringing such a case. But this does not mean there cannot be limits. A utility cannot spend any amount it pleases secure in the knowledge or expectation that ratepayers will foot the bill, particularly when those expenses include items seeking to subordinate ratepayers' interests to those of the utility's investors. Here, even assuming there was no basis in the evidence to reject the presumption of prudence with respect to one or more of Spire's rate case expenses, the PSC did not err in its decision to exclude a portion of those expenses in setting "just and reasonable" rates because they served only to benefit shareholders and minimize shareholder risk with no accompanying benefit (or potential benefit) to ratepayers. To be sure, the PSC's decision to exclude 50 percent of Spire's remaining rate case expenses (after allowing full recovery of the cost of notices and the depreciation study) was not the result of a decision to include or exclude expenses on an item-by-item basis…. The PSC expressly identified those issues (and related expenses) Spire pursued that benefitted only its shareholders and not its ratepayers, and the PSC decided what proportion of the total case (and expenses) they represented. Nothing in the PSC's authorizing statutes or this Court's precedents requires the PSC to conduct an item-by-item analysis when the issue is the degree to which a utility's case expenses should be included in calculating "just and reasonable" rates rather rejecting a particular expense as imprudent. Accordingly, the PSC did not err in excluding a portion of Spire's rate case expenses, and Spire's Points I and II are denied.

As noted in that language, the *Spire* Court held that that the rate case costs in question were not presumed to have been prudently incurred because they created no benefits to customers and served only to advance shareholder interests. That holding is entirely consistent with Liberty's view of the prudence standard, which includes a presumption of prudence for costs that a *utility makes on behalf of its customers*. Such costs would include those incurred from the early retirement of obsolete generation as well as costs for the purchase of fuel and power. The *Spire* case does not support Staff's or OPC's argument for disallowing prudently incurred costs

Inexplicably, Staff later contradicts itself by citing the prudence standard in *State Ex. Rel Associated Nat. Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 529 (Mo. App. 1997) finding that "in order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that (1) the utility acted imprudently [and] (2) such imprudence resulted in harm to the utility's ratepayers."[13] *Which is to say that Staff's brief acknowledges, with citation, that a finding*

[13] Staff Initial Brief, p, 25.

of imprudence is the only basis upon which Liberty can be denied the recovery of its costs. And that such denial would be limited to the harm that befell its customers from any such imprudence. Ultimately, the cases cited by Staff fully support the principle that the Commission cannot disallow any prudently incurred costs from recovery through securitization.

i. There is No Evidence in the Record to Overcome the Prudency Presumption as to Storm Uri Qualified Extraordinary Costs

For Storm Uri, there were limited challenges to the prudence of Liberty's costs: (1) OPC claims that Liberty should have had different resources in its generation fleet so that Liberty would not have made so many market purchases in the SPP IM[14], (2) Staff challenges Liberty's failure to tune its Riverton plant using fuel oil during Storm Uri[15], and (3) Staff claims Liberty's "excess sales" should form a basis to deduct from amounts otherwise found to be prudent. [16]

OPC's discussion of Liberty's resource planning is unsupported to the point that it becomes debatable whether it is actually posing a challenge to the prudency of Storm Uri costs. OPC's arguments are premised on idle speculation by one of its testifying witnesses that if Liberty's customers had somehow known in advance the financial impacts of Storm Uri that they would have preferred to have experienced service interruptions.[17] Even if evidence of the required clairvoyance and documentation of the customers' preferences did exist, OPC does not and cannot ascribe any specific harm to customers from those speculative events.[18] As the Staff correctly asserts, this element alone renders moot consideration of any other element of OPC's assertions.[19]

Staff's Riverton challenge is equally flawed because Liberty could not have done what Staff wants without violating applicable laws and permits. As Liberty explained in its testimony

[14] OPC Initial Brief, p. 8.
[15] Staff Initial Brief, pp. 25-28.
[16] Staff Initial Brief, p. 24.
[17] OPC Initial Brief, p. 13.
[18] OPC Initial Brief, p. 13.
[19] Staff Initial Brief, p. 29.

and Initial Brief, Liberty could not have operated Riverton in the manner that Staff suggests. The underlying record is crystal clear on that issue and Staff's Riverton claim should be rejected.

Staff's arguments for an "excess sales" deduction lacks any statutory basis and is yet another overreach premised on discretion that the Commission does not have under the Securitization Statute. There is no statutory provision authorizing deductions for excess sales and Staff's reliance on the catch-all provision that the Commission consider "all relevant factors" in making a determination under the Securitization Statute does not give license to invent new statutory requirements after the fact.

In fact, the Staff's citation to this assertion explains the flaw in its legal reasoning. Footnote 85 states (emphasis added):

> *State ex rel. Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979) (superseded by statute on other grounds by Section 386.266, RSMo, as recognized in *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 481 (Mo. App. W.D. 2013)).[20]

The decision cited by Staff -- *Utility Consumers' Council* -- concerned an early version of a fuel adjustment clause that was adopted by the Commission without specific statutory authorization. The requirement for the consideration of "all relevant factors" in the *Utility Consumers' Council* case was "superseded by statute" because the General Assembly enacted Section 386.266, RSMo., providing specific statutory authorization for a fuel adjustment clause.

When so "superseded by statute," the Commission's authority is limited by the new statute. In recognizing that situation, the Court in *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 481 (Mo. App. W.D. 2013)) stated as follows (emphasis added):

> Fuel adjustment clauses are thus purely statutory creatures. The PSC's "powers are limited to those conferred by . . . statute[ ], either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Util. Consumers Council*, 585 S.W.2d at 49. Applied here, the *PSC's power to approve or interpret*

[20] Staff Initial Brief, p. 24.

> *a fuel adjustment clause is necessarily constrained by the authority described in section 386.266.1 and by the regulations promulgated pursuant to the authority of section 386.266.9. If a fuel adjustment clause as approved or subsequently interpreted exceeds the authority extended by section 386.266 or by the promulgated regulations, then it is unlawful under the rationale set forth in Utility Consumers Council.*

The Securitization Statute similarly represents specific statutory authorization for the recovery of qualified extraordinary costs through securitization. The Securitization Statute necessarily *does not, and could not, include* consideration of "all relevant factors" as that term has been known, as it specifically identifies those items to be securitized. The items identified by the statute do not even remotely represent consideration of "all relevant factors including all operating expenses . . . ." as suggested by Staff. *See Utility Consumers' Council* at 49. Accordingly, because the Securitization Statute does not contain any requirement or authorization to reduce fuel and purchased power costs by "excess" base rate revenues, Staff's disallowance for "excess" base rate revenues *exceeds the authority extended by section 393.1700 and would, in fact, be unlawful under the rationale set forth in Utility Consumers Council*.

ii. There is No Evidence in the Record to Overcome the Prudency Presumption on Asbury Energy Transition Costs

In its brief, the Staff explains "…that there is sufficient evidence to support a finding that it was reasonable and prudent to retire Asbury," meaning that, in its view, the only criteria for the full recovery of the Asbury balance has been met.[21]

OPC contends that the Commission should disallow recovery of some of Liberty's costs associated with Asbury because it is not used and useful.[22] That argument defies common sense. Any recommendation for a disallowance (or sharing) of costs related to Asbury on the basis that the plant is not used and useful is, by definition, impossible to support since the Securitization

[21] Staff Initial Brief, p. 39.
[22] OPC Initial Brief, pp. 22-23.

Statute provides a means to recover costs associated with generating plants that retire early. No retired plant can be used and useful. Thus, applying OCP's rationale would mean that no utility would ever be able to recover its energy transition costs under any circumstances, in turn rendering the Securitization Statute meaningless.

OPC's other argument is equally flawed. OPC provides a quote from *In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increase for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company* (Report and Order dated August 31, 2000) (9 MoPSC3d 254) to support its position that the Commission should not allow Liberty to recover its undepreciated investment in Asbury.[23] OPC suggests that the facts surrounding Missouri-American Water Company's decision to retire and replace its St. Joseph water treatment plant are "in many ways . . . analogous to those surrounding Liberty's decision to retire Asbury." *Id*. OPC largely distorts the facts underlying Asbury in several ways.

As a factual matter, the decision to retire Asbury was separate and apart from the construction of wind generation by Liberty and made independently. *See* Commission Case Nos. EO-2018-0092 and EA-2019-0010. This is a much different situation than in the quoted case where MAWC had constructed a new water treatment plant to replace an old water treatment plant.

Further, even if one were to see some similarity in these situations, the section of the case cited by OPC was reversed on appeal. The applicable section of the MAWC decision cited by OPC concerned "Premature Retirement." "Premature Retirement" referred to the fact that "the plant was not yet fully depreciated at the moment of its retirement."[24] The Commission did initially find, as indicated by OPC, that this undepreciated amount should be written off.

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[23] OPC Initial Brief, pp. 22-23.
[24] *In the Matter of Missouri American Water Company's Tariff* at 286.

That portion of the Order, however, was later reversed by the Cole County Circuit Court. In Case Nos. 00CV325014, 00CV325196, and 00CV325206, the Court “reversed as to the ‘premature retirement’ issue and remanded to the Public Service Commission for further proceedings consistent with this opinion.”[25] In support of its reversal, the Court stated, among other things, as follows:

> 38. A public utility receives both a "return on” its reasonable investments, as well as a "return of” its reasonable expenses. The Commission's use of the used and useful basis for its decision does not address the "return of” this unrecovered investment.
>
> 39. As stated previously, any depreciation reserve deficiency remaining at the end of the life of plant only remains because the Commission's own depreciation rates have not accurately tracked the life of the plant. Allowing the Commission to then require that such amounts which have been used in the service of the public to be "written off” and not recovered is unlawful….
>
> 42. The Report and Order does not differentiate between extraordinary supersession, and "ordinary obsolescence," the latter being accepted as a recoverable and necessary and proper part of the life of public utility assets. Only limited situations constitute extraordinary supersession and justify a denial of recovery. In this case, the decision to remove the old St. Joseph treatment plant from service was a natural extension of the Company's decision to construct the new St. Joseph treatment plant and related facilities- a decision the Commission found to be prudent.
>
> 43. Further, the old St. Joseph treatment plant was not "obsolete by reason of scientific discoveries and inventions." Water as not replaced by some other substance, agency or company, and the decision to use well water rather than river water as a source of supply is not an example of technological innovation. The Commission's finding that the Company's decision to replace the old plant with a new plant was prudent is inconsistent with the Commission's requirement that the Company forfeit its unrecovered investment in the old plant.
>
> 44. If no consideration is made for the net depreciation related to the old St. Joseph treatment plant, MAWC will suffer a taking or confiscation of its property in violation of the Fifth Amendment of the United States Constitution, applicable to the States under the Fourteenth Amendment, and Art. I, Sec. 26 of the Missouri Constitution. The record does not support the Commission's finding/conclusion that the old St. Joseph treatment plant was the victim of extraordinary supersession.

[25] See Appendix A, p. 18.

The situation cited by the Commission in the MAWC case, and by OPC in its Initial Brief, in regard to extraordinary supersession concerned the replacement of gas lamps with electric lamps ("... superseded by another instrumentality, as gas lamps by electric lights, or by another agency or company, is an extraordinary supersession."). Such a situation does not exist as to Asbury. Liberty has demonstrated that it was reasonable and prudent to retire Asbury as a separate and distinct decision from the construction of wind generation and, more importantly, the General Assembly has recognized that such "energy transition costs" should be recoverable and provided securitization as the cost-effective tool to accomplish this objective. The MAWC case cited by OPC has no bearing on this case other than to show that non-recovery of such amounts related to Asbury would constitute an unconstitutional taking and constitute a clear error of law.

b. The Commission Should Authorize a Carrying Charge Based on Liberty's WACC

In its brief, Staff suggests that the date on which Liberty filed its Securitization petition for Storm Uri Costs should serve as a basis to reduce the Company's carrying charge. Staff claims that "[u]nlike the definition of energy transition costs, the definition of qualified extraordinary costs does not include carrying costs."[26] Further, Staff suggests that because "... Liberty did not file its Uri Securitization request as soon as it could have," Staff's statutory construction "supports some carrying costs, but lower than the full weighted average cost of capital requested by Liberty."[27] Staff's position on this issue is unsupported by the Securitization Statute on both points for two equally compelling reasons.

First, the Securitization Statute, through the definition of "qualified extraordinary costs," *explicitly provides for the recovery of carrying charges*:

> "Qualified extraordinary costs", costs incurred prudently before, on, or after August 28, 2021, of an extraordinary nature which would cause extreme customer rate

[26] Staff Initial Brief, p. 31.
[27] Staff Initial Brief, p. 31.

> impacts if reflected in retail customer rates recovered through customary ratemaking, such as but not limited to those related to purchases of fuel or power, ***inclusive of carrying charges***, during anomalous weather events;

RSMo. §393.1700.1(13) (emphasis added). Second, and as equally important, is what the Securitization Statute does not state. There is *absolutely no provision in the Securitization Statute* that directs or permits the use of a carrying cost rate based on the timing of an electrical corporation's application. That argument should be rejected out of hand.

Staff and OPC also argue that the Commission can assign a carrying charge based on a debt-only rate.[28,29] Nothing in the Securitization Statute indicates that a debt-only rate is the appropriate charge. Both Staff and OPC contend, in essence, that the statute *allows* for the application of a debt-only rate because the term "carrying charge" is not specifically defined; however, such arguments provide equal support for the assignment of an equity-only carrying charge. None of the parties are able to explain why the Legislature would intend that Liberty recover a debt-only charge but then chose not to specify that directive in an otherwise lengthy, detailed, and highly prescriptive statute. Staff states only that "[g]eneral public interest considerations support some sharing of extraordinary natural disaster costs between a utility and its customers, further supporting a carrying cost lower than the full weighted average cost of capital."[30,31] Without sounding like a broken record, the Securitization Statute does not contain any language stating or supporting these arguments by Staff and OPC.

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[28] Staff Initial Brief, pp. 19, 32, 54.

[29] OPC Initial Brief, p. 17.

[30] Staff Initial Brief, p. 32.

[31] There is no statutory basis in Missouri for a utility to "share" costs simply on the basis that doing so could reduce rates. The incurrence of high rates creates no rationale for doing so. Repeatedly in the course of this proceeding and, in particular, in their initial briefs, the Staff and OPC use the term "sharing" as a thinly veiled euphemism for "taking."

c. Determination 2: The Commission Must Determine Whether Securitization is Expected to Create Quantifiable Benefits to Customers

In order for the Qualified Extraordinary Costs and Energy Transition Costs to be securitized, the Commission must determine whether to do so would create benefits to customers. That determination is specified in §393.1700.2(1)f of the Securitization Statute, which indicates that the Commission must compare the costs to customers that would be incurred from the issuance of securitization bonds to the costs of the "traditional" method of financing and recovery. That comparison is the basis of a test as to whether securitization creates "quantifiable net present value benefits." If the comparison shows that there are quantifiable benefits, securitization can proceed. In this instance, that is the case.

This "math test" is at the heart of the analysis and allows the Commission to proceed with securitization if the math is in customers' favor. On this record, Liberty has met and satisfied the necessary Net Present Value benefits showing. Specifically, the record indicates that there are expected to be $42,276,691 in benefits, stated on an NPV basis, from securitizing the Qualified Extraordinary Costs.[32] Likewise, there are expected to be $31,096,447 in benefits from securitizing the Energy Transition Costs.[33] The statutory test is clearly met.

d. Determination 3: The Commission Must Determine Whether the Method of Cost Recovery is Just and Reasonable and in the Public Interest

After passing the statutory math test, the statutory inquiry then turns to whether the proposed terms and mechanics of Liberty's proposed bond issuance are in the public interest and are just and reasonable. The statute allows the Commission to determine whether the terms or mechanics of the proposed bond issuance are in the public interest and just and reasonable. The Financing Order issued by the Commission must include its approval of a method for recovering

[32] Ex. 8, Emery Surreb., p. 10.
[33] Ex. 8, Emery Surreb., p. 8.

the costs of the bonds issued that that meets the "just and reasonable and in the public interest" standard. Importantly, this is the only instance in which the Commission is required or authorized to apply the "just and reasonable" standard.

Here, it is critical to understand how the Securitization Statute uses the term "just and reasonable." That term is only used three times in the Statute, each instance appearing in a subsection that describes the requirement that certain elements be included in a financing order issued by the Commission:

> (c) A financing order issued by the commission, after a hearing, to an electrical corporation shall include all of the following elements: a. The amount of securitized utility tariff costs to be financed using securitized utility tariff bonds and a finding that recovery of such costs is ***just and reasonable*** and in the public interest. The commission shall describe and estimate the amount of financing costs that may be recovered through securitized utility tariff charges and specify the period over which securitized utility tariff costs and financing costs may be recovered; b. A finding that the proposed issuance of securitized utility tariff bonds and the imposition and collection of a securitized utility tariff charge are ***just and reasonable*** and in the public interest and are expected to provide quantifiable net present value benefits to customers as compared to recovery of the components of securitized utility tariff costs that would have been incurred absent the issuance of securitized utility tariff bonds. Notwithstanding any provisions of this section to the contrary, in considering whether to find the proposed issuance of securitized utility tariff bonds and the imposition and collection of a securitized utility tariff charge are ***just and reasonable*** and in the public interest, the commission may consider previous instances where it has issued financing orders to the petitioning electrical corporation and such electrical corporation has previously issued securitized utility tariff bonds;[34]

For the reasons explained at length above, the "just and reasonable" standard cannot apply to the determination of the Qualified Extraordinary Costs and the Energy Transition Costs because those amounts are established by a prudence determination (described above as Determination #1). The benefits test that must be met in order to issue bonds (Determination #2) is narrowly defined in the

[34] RSMo, 393.1700.2(3)(c)a and b (emphasis added).

Securitization Statute. But a wide range of issues related to financing, recovery, and other topics are subject to the Commission's application of the "just and reasonable" standard.

For example, this may require the Commission to investigate a broad range of potential issues relating to the mechanics of the bond issuance. The Commission could be required to evaluate proposed amortization periods for securitization bonds to ensure that they are not so short as to result in rate shock – which is possible even if the benefits test is satisfied.

Potentially, the Commission could be required to ensure that the design of the rates used to recover the costs to repay the bonds is just and reasonable. That is, in fact, an issue in this proceeding as Liberty has proposed a rate design that is supported by MECG but opposed by the Staff. [35] The Commission may apply the just and reasonable standard to determine which proposed rate design, if either, should be implemented.

Ultimately, as set forth in the Statute, the "just and reasonable" and "public interest" standard go to how the costs are recovered (meaning the mechanics of the proposed securitization), not the amount recovered, as Staff suggests. On this issue, the bottom line is that Staff's and OPC's arguments show that neither feel particularly bound by the Securitization Statute. That may be tolerable in the spirit of their zealous advocacy for the reduction of customer rates. But this Commission may not ignore or disregard the Securitization Statute. The Securitization Statute says that a utility must be allowed to recover costs that were prudently incurred. The disallowance of cost recovery for any other reason would violate the law, grossly exceed the Commission's statutory authority, and constitute reversible error.

[35] MECG Initial Brief, p. 2.

III. THE COMMISSION SHOULD REJECT STAFF'S ARGUMENT THAT THE ADIT BALANCES SHOULD BE REFUNDED

In its initial brief, Staff argues that Liberty is required to refund the balance of its ADIT accounts to its customers.[36] Staff fabricates a "fatal flaw" from the fact that Liberty's ADIT balance is $36 million but Liberty proposes to refund only $5 million. But the real fatal flaw is Staff's misunderstanding of the issue. Even under securitization, Liberty will still need to pay the entire ADIT balance as taxes over time. Because Liberty does not have to pay those taxes immediately, it can deploy those funds elsewhere in the time between when they were collected from the customers to the time they will be paid to the IRS. The calculations in Liberty's testimony demonstrate that benefit is worth approximately $5 million and that the refund in that amount is already embedded in the calculation of the Energy Transition Costs. That is the proper ADIT balance for purposes of securitization.

That means this ADIT issue already is revenue neutral for Liberty: Every dollar collected will be paid to the IRS and the benefit from holding those dollars has been calculated and will be refunded. To require that Liberty provide additional refunds via a disallowance would be to incorrectly impose a penalty based on a deficient and unsupported understanding of deferred tax accounting. Staff completely misapplies these ADIT principles, and its argument should be denied.

IV. CONCLUSION

The outcome of this case will establish a critical precedent for this Commission and the electric utility industry in Missouri. The Securitization Statute creates tools and options that have the potential to be incredibly beneficial to customers as they navigate extraordinary events and an ongoing energy transition. But only if the Commission applies the Securitization Statute as

[36] Staff Brief at 35.

written. If the Commission applies the Statute as written and authorizes Liberty to recover through securitization all of the costs prudently incurred for Storm Uri and Asbury on behalf of customers, this Commission will be on the cutting edge of using securitization to reduce customer costs and moving the industry to a sustainable and cost-effective future.

Unfortunately, however, Staff and OPC both make recommendations that undermine the Securitization Statute and clearly require the Commission to exceed its authority. Staff and OPC would have the Commission knowingly and intentionally set aside the Securitization Statute passed by the Missouri General Assembly less than two years ago, in essence substituting the Commission's judgment for that of the Legislature.

For a zealous advocate, such an end may justify the means. For the Commission, however, the Statute must be applied as it is written. In this case, the Statute says that Liberty is allowed to recover through securitization the costs it prudently incurred on behalf of its customers. The only possible instances of exception, of which there are none in evidence, would be the deduction of amounts equal to the financial harm that customers suffered from specific instances in which Liberty can be shown to have acted imprudently.

It is critical that the Commission recognize the far-reaching implications of this proceeding. If Liberty is allowed to recover the costs it incurred on behalf of its customers here, as is the clear intent of the Securitization Statute, there will exist an opportunity for other utilities to use securitization on their customers' behalf to recover large amounts of capital deployed on their behalf without creating intolerable rate shock and the societal ramifications that come with it.

On the other hand, if this Commission adopts any of the arbitrary disallowances put forth by Staff or OPC, such decision will be clear reversible error as well as establish a severely negative precedent for the state of Missouri. Any such decision would put a black mark on the Missouri Securitization Statute as arbitrary and risky in ways that are not consistent with the Securitization

Statute and effectively render the Securitization Statute useless, which clearly would not be consistent with the Legislature's intent. That means that Liberty and other electric utilities will be less likely to invest in energy transition towards a sustainable future, even when doing so would benefit customers. And they will have fewer options and less flexibility to deal with extreme weather events – a critical factor in today's world of severe climate change.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above document was filed in EFIS on this 20th day of July, 2022, and sent by electronic transmission to all counsel of record.

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